

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TATIANA WESTBROOK, an individual;
JAMES WESTBROOK, an individual;
HALO BEAUTY PARTNERS, LLC, a
Nevada Limited Liability Company,

Plaintiffs,

v.

KATIE JOY PAULSON, an individual;
WITHOUT A CRYSTAL BALL, LLC, a
Minnesota Limited Liability Company; and
DOES 1 through 100, inclusive,

Defendants.

NO. 2:20-cv-01606 BJR

DEFENDANTS' MOTION TO QUALIFY
COUNSEL TO CONTINUE
REPRESENTATION

DEFENDANTS' MOTION TO QUALIFY

GORDON TILDEN THOMAS CORDELL	600 University Street Suite 2915 Seattle, WA 98101 206.467.6477
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I. INTRODUCTION

A. Conference of Counsel

On January 13, 2021, Plaintiffs filed the Declaration of non-party witness Lori Ann Barnhart (Dkt. 38-1). In that declaration Ms. Barnhart: (1) testified that on or about January 10, 2021, the undersigned offered to represent her as her attorney for purposes of her response to a subpoena from Plaintiffs; (2) suggested that such an attorney-client relationship was formed at around that time; and (3) testified that she had some “interest” with regard to this lawsuit that was in conflict with the interests of the undersigned’s client, Defendant Ms. Paulson. Defendants were concerned that Plaintiffs included this testimony in the declaration to set up an argument to disqualify the undersigned and his firm from continuing to represent Defendants in this matter. Declaration of Michael Brown (“Brown Decl.”), ¶ 4. Accordingly, the undersigned arranged a meet-and-confer with Plaintiffs’ counsel on January 27, 2021 to discuss the matter and his plan to bring a “motion to qualify” to request that this Court enter an order finding that no disqualifying attorney-client relationship was formed. *Id.*

To the undersigned’s surprise, in that call, Plaintiffs’ counsel assured the undersigned that, despite having included the above testimony in Ms. Barnhart’s declaration, they did not see a potential conflict issue and had no intention of arguing for disqualification based on any such alleged attorney-client relationship. *Id.* Based on that representation, the undersigned sought further guidance on the ethics issue, and determined that the motion to qualify could be obviated if Plaintiffs would simply confirm in writing what they represented during the meet-and-confer. *Id.*

The undersigned proceeded to repeatedly ask Plaintiffs for that confirmation, but they repeatedly refused. *Id.*, ¶ 5 & Ex. A. Initially they explained that they wanted to reserve the right to move to disqualify if “it *becomes* an issue *later on*” and “if and when [they] *learn more*” information. *Id.*, Ex. A at 2, 4 (emphasis added). The undersigned responded that: (1) the stipulation need only repeat what Plaintiffs represented during the call—that they have no

1 *current* concerns that would cause them to ask for disqualification; and (2) they could reserve the
 2 right to move in the extremely unlikely event they learned new information that would give rise
 3 to such a concern. *Id.* at 5. Plaintiffs then shifted their position, stating that they “do have
 4 concerns” *currently* about a potential conflict, based on what they knew at the time of the meet
 5 and confer, and therefore would not sign a stipulation. *Id.* at 6.

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 10 Defendants should not be forced to proceed under the constant threat that Plaintiffs will
 11 choose some strategic time in the future to make the disqualification motion that they clearly
 12 hinted at in the Barnhart Declaration, then clearly disclaimed on January 27, and then hinted at
 13 once again when asked to commit to that position in writing. As such, Defendants ask the Court
 14 to rule now on the disqualification issue, to give them some certainty that their defense in these
 15 proceedings, or future proceedings in another forum, will not be disrupted by a motion to
 16 disqualify that Plaintiffs are keeping in their back pocket.

21 **B. Summary of Argument**

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 23 As explained in Dockets 43-1 and 52, the circumstances surrounding Plaintiffs’
 24 procurement of Ms. Barnhart’s testimony were highly unusual and highly concerning, and there
 25 is reason to believe Ms. Barnhart was not in a position to swear an oath to any testimony on
 26 January 13. However, even taking her testimony regarding an alleged attorney-client
 27 relationship at face value, the undersigned remains qualified to continue to represent Defendants,
 28 for the following reasons:

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 30 *First*, “disqualification is a drastic measure” and “the Court must consider the danger of a
 31 motion to disqualify opposing counsel as a litigation tactic.” *FMC Technologies, Inc. v.*
 32 *Edwards*, 420 F. Supp. 2d 1153, 1157 (W.D. Wash. 2006). Plaintiffs’ shifting positions on this
 33 motion only underscore this concern here.

34
 35 *Second*, the emails on which the declaration relies do not support a *reasonable* belief on
 36 the part of Ms. Barnhart that the undersigned offered to act as her attorney.

Fifth, any confidentiality that would have attached to Ms. Barnhart's communications with the undersigned was waived by virtue of the declaration's express reliance on and characterization (and mischaracterization) of those communications, for the purpose of impugning the undersigned.

A. The communications between the undersigned and Ms. Barnhart.

DEFENDANTS' MOTION TO QUALIFY - 3

GORDON	600 University Street
TILDEN	Suite 2915
THOMAS	Seattle, WA 98101
CORDELL	206.467.6477

1 of the First Barnhart Declaration was twofold: (1) to explain the abusiveness of the Fulmer
 2 Declaration and specifically Ms. Barnhart's belief that she was deliberately "outed" in retaliation
 3 over a spat she had with Plaintiffs' counsel, Michael Saltz, in November 2020; and (2) to
 4 confirm Defendants' statements, that they did not know Ms. Barnhart resided in Washington
 5 until that fact was disclosed in this lawsuit. *Id.*, Ex. B at 117-123. Ms. Barnhart helped prepare
 6 and edit that First Barnhart Declaration, and was eager to sign it on the evening of January 6,
 7 2021, before the undersigned informed her we needed to delay that filing. Dkt. 43-1 ¶¶ 23-26.

8 The undersigned and Ms. Barnhart also exchanged emails, and spoke about, Plaintiffs'
 9 subpoena to Ms. Barnhart (which was never served). It is the emails regarding this latter subject
 10 that form the basis for the suggestion in Ms. Barnhart's declaration that she and the undersigned
 11 formed an attorney-client relationship. *See* Dkt. 38-1 at ¶¶ 24-26. The undersigned and
 12 Ms. Barnhart spoke on the phone on January 5, 2021 about the declaration and the subpoena; the
 13 undersigned explained that he was Defendants' attorney, and not hers. She told the undersigned
 14 that she already recognized this. Declaration of Michael Brown In Support of Motion to Qualify
 15 ("Brown Decl."), ¶ 2.

16 Ms. Barnhart now relies on emails the undersigned sent subsequent to this call, to suggest
 17 that at some point he became "her" lawyer for purposes of responding to the subpoena. In those
 18 emails, the undersigned provided general information and admonitions to Ms. Barnhart regarding
 19 responding to subpoenas, and responded to some of her concerns, including her concern that she
 20 did not have money or technical expertise to comply with a demand for electronic data from her
 21 social media and email accounts. The emails pertaining to the subpoena (among other topics)
 22 can be found at Dkt. 43-1, pp. 145-200 and Dkt. 52, Ex. B at 125, 145, 165, 167.

23 **B. Ms. Barnhart suddenly changed sides and completely changed her story on January**
 24 **13, 2021.**

25 Ms. Barnhart's emails to the undersigned late on January 10 and continuing into January
 26 11 began to sound confusing, and appeared to reflect an increasing level of anxiety and even

1 despair over the harassment and intimidation she had been subjected to at the hands of Plaintiffs’
 2 counsel. Dkt. 43-1 at 186-203; Dkt 52 at 125, 145, 165, 167. On January 12, 2021—after 18
 3 days of frequent communications with the undersigned—Ms. Barnhart “flipped” and contacted
 4 Plaintiffs’ counsel. Dkt. 38-1 ¶ 28.
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6 The next day, Plaintiffs’ counsel interviewed Ms. Barnhart for 11 hours, prepared a
 7 different declaration for her to sign (the “Second Barnhart Declaration”), and procured her sworn
 8 signature to it. They did this with the knowledge that: (1) Ms. Barnhart believed she was
 9 represented by the undersigned; (2) she was eager to swear under oath a week earlier to an
 10 *entirely different* and nearly perfectly contradictory version of events; (3) the 150 emails
 11 exchanged between the undersigned and Ms. Barnhart over the previous 18 days were perfectly
 12 consistent with the First Barnhart Declaration, which she was eager to sign under oath, and
 13 contradicted the testimony they were putting in front of her in the Second Barnhart Declaration;
 14 and (4) she admitted to them to being confused and unable to remember things well because of
 15 medication and anxiety. *See* Dkt. 60 ¶¶ 2-5. After the Second Barnhart Declaration was filed,
 16 the undersigned came into possession of information strongly suggesting that Ms. Barnhart was
 17 not aware of what she was signing when she signed it. *See* Dkt. 52, Exs. A, B.
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19 In this second declaration Ms. Barnhart states that the undersigned became her attorney at
 20 some point, with respect to her response to Plaintiffs’ subpoena. Dkt. 38-1 ¶¶ 24-28. The
 21 circumstances surrounding the preparation of that declaration and Ms. Barnhart’s state of mind
 22 when she signed it, provide strong grounds for this Court to disregard that “testimony.” *See* Dkt.
 23 43-1 ¶¶ 9-22. However, as explained below, even taking the Second Barnhart Declaration at
 24 face value, the undersigned is not subject to disqualification from this matter.
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26 III. ARGUMENT

27 A. Disqualification is an extraordinary and disfavored remedy.

28 “Disqualification of counsel is a drastic measure that should be imposed only when
 29 necessary. The Court must consider the danger of a motion to disqualify opposing counsel as a
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litigation tactic.” *FMC Technologies, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1157 (W.D. Wash. 2006); *see also Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (“Because of this potential for abuse, disqualification motions should be subjected to particularly strict judicial scrutiny.”) (quotations omitted). Here, the odd circumstances surrounding Plaintiffs’ procurement of the Second Barnhart Declaration and Plaintiffs’ shifting positions regarding disqualification should only heighten the Court’s suspicion of their motives.

B. An attorney-client relationship never formed between the undersigned and Ms. Barnhart.

1. The existence of an attorney-client relationship turns on the putative client’s reasonable subjective belief that such a relationship was formed.

“An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists.” *Dietz v. Doe*, 131 Wn.2d 835, 843 (1997) (quoting *In the Matter of the Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522 (1983)). However, the belief of the putative client will control only if it “is reasonably formed based on the attending circumstances, including the attorney’s words or actions.” *Id.* (quoting *State v. Hansen*, 122 Wn.2d 712, 720 (1993)). The determination of whether an attorney-client relationship exists is a question of fact. *Id.* The burden of proving the existence of an attorney-client relationship falls on the party asserting it. *Id.*

As explained below, the facts do not support a finding that Ms. Barnhart and the undersigned entered into an attorney-client relationship. Indeed, Ms. Barnhart’s own testimony demonstrates that no such relationship was formed.

2. The emails between the undersigned and Ms. Barnhart do not convey an offer to form an attorney-client relationship with respect to Ms. Barnhart’s subpoena response.

The suggestion that an attorney-client relationship was formed is premised on two particular emails, one on January 10 and another on January 11 of 2021. Dkt. 38-1 at ¶¶ 24-26.

Neither of them, taken alone or along with the other emails pertaining to the subpoena, support a conclusion that the undersigned was acting as Ms. Barnhart's attorney with respect to responding to that subpoena.

a. The January 10, 2021 email.

Ms. Barnhart wrote to the undersigned on January 8, 2021, explaining that Plaintiffs' counsel's harassing conduct had already caused her severe anxiety and that she "may just ignore [the subpoena] altogether." Dkt. 52, Ex. C at 145. The undersigned attempted to respond in a manner that would calm Ms. Barnhart's fears and dissuade her from simply "ignoring" the subpoena. This is what led the undersigned, on January 10, 2021, to write the sentences on which Ms. Barnhart's declaration now relies:

I recommend that you sit tight, accept service if they come to your door, and then we can take it form [sic] there. You are not in any trouble.

Dkt. 38-1 at ¶ 24. In her declaration, Ms. Barnhart states: "Such statement confirmed to me that I apparently was a client of Mr. Brown's, in that I understood his statement to mean that he was inserting himself into my situation of having to respond to a subpoena." *Id.*

It is difficult to know what it means to say that an email "confirmed" that something was "apparently" the case.¹ The question is whether Ms. Barnhart subjectively believed the undersigned was her attorney, not whether it was "apparently" the case that the undersigned was. Further, even if this were read to assert such a subjective belief, that belief must be "reasonably formed based on the attending circumstances, including the attorney's words or actions." *Dietz*, 131 Wn.2d at 843. Ms. Barnhart explained that the undersigned's email apparently confirmed an attorney-client relationship *because* she "understood Mr. Brown's statement to mean that he was inserting himself into my situation of having to respond to a subpoena." Dkt. 38-1 at ¶ 24. To

¹ Plaintiffs' counsel prepared this declaration, presumably with the knowledge of the applicable test under Washington law governing the existence of an attorney-client relationship. Yet for some reason they decided to include this vague and ambiguous testimony.

the extent any meaning can reliably be discerned from that odd phrase, it is not a fact or circumstance from which a person could plausibly conclude that an *attorney-client* relationship had been formed. Indeed, it is perfectly consistent with Defendants’ position, that the undersigned “involved himself” simply by providing and offering general information and assistance regarding responding to a subpoena.

b. The January 11, 2021 email.

The second email from the undersigned on which Ms. Barnhart relies is dated January 11, 2021. That email was in direct response to Ms. Barnhart emailing the undersigned the following message, regarding responding to the subpoena:

I’m not going to go to court I have no money. I don’t know how to download everything on my phone so it won’t be done.

Dkt. 52, Ex. C at 165. The undersigned responded shortly thereafter. The portion of that response on which the declaration relies states as follows:

You don’t need to spend money or hire a lawyer to respond to the subpoena or file a declaration. I’d like to stand up for you by filing your declaration if you’d let me. It costs you nothing.

Dkt. 38-1 at ¶ 25. Ms. Barnhart characterizes this as an “offer[] to represent me at no charge in responding to said subpoena.” *Id.* However, in context, this is clearly *not* an offer to represent Ms. Barnhart as her lawyer for free.

The undersigned’s intent in writing these sentences in response to Ms. Barnhart’s concerns was to reassure her of two things. First, the undersigned wanted Ms. Barnhart to understand that she did not need to spend money to respond to the subpoena, for example, by paying to have data retrieved (because she did not know how to do it). Offering to provide general information to a witness regarding the logistics of gathering electronic data from a smartphone or personal computer, is not the sort of assistance that constitutes legal advice or supports that witness’ subjective belief that an attorney-client relationship has been formed. Second, the undersigned wanted Ms. Barnhart to understand that, based on what she had told me,

1 she did not need to be represented by a lawyer *at all* in the process of responding. Brown Decl.,
 2 ¶ 3.
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 5 **3. Even if Ms. Barnhart had a reasonable subjective belief that the undersigned**
 6 **offered to be her attorney, Ms. Barnhart’s own testimony proves she**
 7 **responded by *rejecting* that offer.**

8 After describing the above email passages as forming an “offer” to represent her,
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 10 Ms. Barnhart testified that she in effect rejected that offer. She explained that: (1) she was “very
 11 suspicious of Mr. Brown’s motives” in offering to assist with the subpoena response; (2) she
 12 “*was not comfortable* with having Mr. Brown controlling the production of[her] documents
 13 and/or other evidence,” (3) she “*did not feel comfortable with Mr. Brown’s offer of*
 14 *representation*; and (4) “was concerned that there would be a conflict of interest in representing
 15 [her] and [Defendants].” Dkt. 38-1 at ¶¶ 25-26 (emphasis added). Indeed, Ms. Barnhart testified
 16 that she was so “uncomfortable” with the undersigned’s alleged offer, that she responded to it by
 17 “cut[ting] off all communications with” the undersigned, and then proceeded to contact
 18 Plaintiffs’ counsel. *Id.* at ¶ 28. And, in fact, Ms. Barnhart did cease communicating with the
 19 undersigned on January 11, 2021.
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 23 **C. Even assuming an attorney-client relationship was formed, RPC 1.9 is not**
 24 **implicated here.**

25
 26 **1. Ms. Barnhart has no interests materially adverse to Defendants (RPC 1.9(a)).**

27 Ms. Barnhart’s suggestion of the formation of an attorney-client relationship potentially
 28 implicates RPC 1.9(a). That rule provides that
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30 [a] lawyer who has formerly represented a client in a matter shall
 31 not thereafter represent another person in the same or a
 32 substantially related matter *in which that person’s interests are*
 33 *materially adverse to the interests of the former client* unless the
 34 former client gives informed consent, confirmed in writing.
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36 R.P.C. 19(a) (emphasis added). For the following reasons, Ms. Barnhart has no interests that are
 37 materially adverse to Defendants’ interests.
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1 First, the only indication of an adverse interest is in the form of vague assertions in the
 2 Second Barnhart Declaration. As set forth in detail in Dockets 43-1, 52 and 59 at 10, that
 3 declaration lacks any evidentiary value, because of the circumstances surrounding its drafting.
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 6 Second, the only “interest” even hinted at in the Second Barnhart Declaration is
 7 Ms. Barnhart’s alleged possession of *information* that contradicted testimony Ms. Paulson
 8 provided in support of Defendants’ Motion to Dismiss. As explained at length in Docket 43-1,
 9 that “information” is contradicted by what Ms. Barnhart repeatedly said and wrote to the
 10 undersigned over the 18-day period they were in communication, and the testimony in the First
 11 Barnhart Declaration. *See* Dkt. 43-1 at ¶¶ 33-40. Ms. Barnhart’s “first” story was plainly
 12 consistent with Defendants’ interests. It would be unfair to Defendants and the undersigned to
 13 permit Plaintiffs and/or Ms. Barnhart to *create* a disqualifying conflict by suddenly changing that
 14 story 180 degrees.
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 18 Third, even if Ms. Barnhart was in possession of information that would be somehow
 19 damaging to Defendants, that would not give her a material “interest” that could be jeopardized
 20 by the undersigned continuing to represent Defendants in this matter. Indeed, Ms. Barnhart
 21 repeatedly told the undersigned that she had *no* position with respect to the claims in this
 22 litigation; she explained she was just “caught in the middle.” Dkt. 43-1 at 171 (“I am caught in
 23 the middle.”); *see also id.* at 99-100 (“I have no basis to judge those legal claims [in this lawsuit]
 24 and I have had no interest in the Westbrooks before or after this lawsuit began.”); 35 (“I have
 25 never had any interactions with Tati [Westbrook] or her family. I have never tweeted anything at
 26 or about Tati. Isn’t this about Tati and her harassment?”); 15 (“Katie [Paulson] knows I have
 27 nothing to do with this.”). Moreover, to the extent Ms. Barnhart actually had such damaging
 28 information, and had an interest in disclosing it, she has already done that, when she gave
 29 Plaintiffs’ counsel access to her emails and social media accounts, allowing them to review
 30 *everything* therein, apparently with no constraints and no supervision.
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1 **2. Ms. Barnhart clearly waived any confidentiality with respect to her**
 2 **communications with the undersigned (RPC 1.9(c)).**

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 4 Ms. Barnhart’s assertions regarding an attorney-client relationship also potentially
 5 implicate RPC 1.9(c). That rule provides:

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 7 A lawyer who has formerly represented a client in a matter . . .
 8 shall not thereafter: (1) use information relating to the
 9 representation to the disadvantage of the former client except as
 10 these Rules would permit or require with respect to a client, or
 11 when the information has become generally known; or (2) reveal
 12 information relating to the representation except as these Rules
 13 would permit or require with respect to a client.
 14

15 RPC 1.9(c). The key concern behind RPC 1.9(c) is “that confidential factual information as
 16 would normally have been obtained in the prior representation would materially advance the
 17 [current] client’s position in the subsequent matter.” RPC 1.9, Comment [3].
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19 There is no risk of that here. Assuming for the sake of argument that Ms. Barnhart had a
 20 reasonable expectation of attorney-client confidentiality during her discussions with the
 21 undersigned, she clearly waived it by explicitly relying on those very communications in the
 22 Second Barnhart Declaration, and by doing so for the purpose of impugning the undersigned’s
 23 professional integrity. Dkt. 38-1 ¶¶ 19-28; *see Rock River Communications, Inc. v. Universal*
 24 *Music Group, Inc.*, 745 F.3d 343, 353 (9th Cir. 2014) (waiver by reliance on privileged
 25 communications under “sword-shield doctrine”); *Pappas v. Holloway*, 114 Wn.2d 198, 207
 26 (1990) (same); RPC 1.6(b)(5) (attorney may rely on otherwise confidential communications to
 27 respond to allegations concerning representation of the client). Further, to the extent the
 28 information Ms. Barnhart provided to the undersigned benefits Ms. Paulson, Rule 1.9(c) is not
 29 implicated because the information in no way harms any interest of Ms. Barnhart.
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39 **IV. CONCLUSION**

40 For the foregoing reasons, Defendants respectfully request that the Court enter an order
 41 finding that no grounds exist to disqualify the undersigned or the law firm Gordon Tilden
 42 Thomas & Cordell LLP.
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1 DATED this 18th day of February, 2020.

2
3 **GORDON TILDEN THOMAS & CORDELL LLP**

4 Attorneys for Defendants

5 By s/ Michael P. Brown

6 Michael P. Brown, WSBA #45618

7 600 University Street, Suite 2915

8 Seattle, Washington 98101

9 206.467.6477

10 mbrown@gordontilden.com